The common law has had considerable difficulty in identifying a principle or principles by which to explain the role of the courts in reviewing administrative action. In this article it is argued that that principle is necessarily a constitutional principle and that the starting point for its analysis in Australian law is the Commonwealth Constitution. It is then argued that the Commonwealth Constitution, and in particular the separation of judicial power within it, necessarily limits the extent of permissible judicial review. In particular, the separation of judicial power justifies and requires the distinction between jurisdictional and non-jurisdictional errors and the distinction between invalidity and merit review in Australian administrative law. This constitutional basis for judicial review, combined with the discipline of a written Constitution, also explains why recent developments in English and New Zealand common law in relation to judicial review are not appropriate or applicable to Australia.

As Stephen Gageler has persuasively argued, the common law of judicial review has developed by a process of 'bottom up reasoning'. By this he means that the judges have developed the law not in response to some overarching principle ('top down reasoning'), but rather by proceeding from case to case largely unassisted by any such principle.

However, as Gageler also points out, even the 'bottom upper' must have some organising theory. Even to proceed by analogy from case to case 'it is necessary to have some concept of the principle by which the analogy is to be discovered'. The purpose of this article is to consider the relationship between any such organising theory and the overall constitutional structure.
ULTRA VIRES

Since at least 1700, the role of the courts in reviewing administrative and judicial decisions was explained on the basis of the rule of law. The relevant act or decision was invalid because it was in breach of or unauthorised by the law, or was beyond the scope of the power given to the decision maker by the law and was consequently of no legal effect, or the relevant decision maker had failed to comply with the law and should be compelled to do so. Judicial review was thus an aspect of the rule of law and could be explained by the principle of ultra vires. This explanation for judicial review is usually described as the 'ultra vires theory'.

One of the problems in this area of discourse is the inappropriate use of 'labels' that may be misleading. The description of the theory of 'ultra vires' may be an example. The words 'ultra vires' simply mean that there is a lack of power under the law; it says nothing about the source of the power. Since at least 1602 in The Case of Monopolies, the English courts have claimed the authority to inquire into the extent and limits of the Crown's common law prerogative powers. In appropriate cases the courts have held that the purported reliance by the Crown upon the prerogative was ultra vires and unlawful. The principle of ultra vires is not limited to statutory powers. Nevertheless, the phrase 'ultra vires theory' seems primarily (though not solely) to have been used to describe those that have seen the overarching principle in administrative law not as ultra vires per se, but as ultra vires by reason of excess or breach of statutory power. For example, Brennan J pointed out in Ainsworth v Criminal Justice Commission that administrative law 'depends at base on the principle that any person who purports to exercise an authority conferred by a statute must act within the limits and in the manner which the statute prescribes'. This is the classic exposition of the principle supporting judicial review: the courts were merely giving effect to the limitations inherent in the legislation that created the relevant executive power in the first place. On this basis administrative law could be viewed as merely an aspect of the proper role of the courts in both recognising and enforcing parliamentary sovereignty. The courts had jurisdiction to interfere because the relevant act was ultra vires and invalid.

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3 Louis Jaffe and Edith Henderson, 'Judicial Review and the Rule of Law: Historical Origins' (1956) 72 Law Quarterly Review 345. The writers point out that the development of judicial review was a consequence of the separation of functions between the courts and the executive during the 17th century. The courts asserted the power to determine the legality of executive action. The task of the courts was 'to contain administrative activity within the bounds of delegated power: to apply to administrative action the test of "legality"' ibid 346. It should be noted that Susan Kneebone, 'What is the Basis of Judicial Review' (2000) 12 Public Law Review 95, 97–98 argues that Jaffe and Henderson identify the source of judicial review as the autonomy, if not the supremacy, of the common law. However, this seems to read too much into the article.

4 See, for example, the explanation by the High Court in Minister for Immigration & Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259, 272 citing Brennan J in Attorney-General (NSW) v Quin (1990) 170 CLR 1, 35–6.

5 Darcy v Allein (1602) 11 Co Rep 84b; 77 ER 1260 and see The Case of Proclamations (1610) 12 Co Rep 74; 77 ER 1260, 'Also it was resolved that the King hath no prerogative but that which the law of the land allows him'.

6 See, for example, Attorney General v De Keyser's Royal Hotel Ltd (1920) AC 508.

7 (1992) 175 CLR 564, 584.
One advantage of this theory is that it enabled administrative law to be described within a general theory of invalidity. The relevant statute described not only the extent and nature of the powers being conferred, it also specified the consequences of any breach of power. On the face of it, a court in performing the function of judicial review was doing no more than enforcing the will of the legislature as expressed in its statutes.

As we shall see, this theory is still well accepted in Australia. However, it has a number of problems. First, the theory of ultra vires does not, in itself, describe the extent or nature of the powers conferred. The theory identifies the source of the jurisdiction—it does not necessarily prescribe the process of statutory interpretation. For example, if one ignores for the moment the possibility of review for an error on the face of the record, in Australia the law is clear that judicial review is only available in relation to jurisdictional errors. In Australia an error of law, at least if committed by a judicial body, does not give rise to a jurisdictional error. The relevant legislation conferring jurisdiction is interpreted as authorising the inferior court to make jurisdictional errors. This is not the position in England even though, until recently, the English courts also justified judicial review by the principle of ultra vires. There are some commentators who seem to have confused the debate about whether judicial review is or should be limited to jurisdictional errors or not, with the debate about whether the overarching principle is the ultra vires theory or some other theory. The reality is that the issues are separate. The ultra vires theory does not itself dictate whether statutory powers should be interpreted as permitting or proscribing non jurisdictional errors. However, the issue then needs to be faced whether there is some other principle beyond the ultra vires principle that is also in operation to explain not merely the question of jurisdiction, but also the issue of statutory interpretation involved.

Another example can be seen in the development and explanation of the principle articulated by Lord Greene in Associated Provincial Picture Houses Ltd v Wednesbury Corporation that the exercise of a discretion will be invalid if the result is 'so absurd that no sensible person could ever dream that it lay within the power'. That principle can be traced back to the test of unreasonableness as applied to delegated legislation in

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9 This is discussed below, see text accompanying nn 111-4.


13 See Boddington v British Transport Police (1999) 2 AC 143, 171 and see discussion below.

14 See eg, Naomi Sidebotham, 'Shaking the Foundations: Dicey, Fig Leaves and Judicial Review' (2001) 8 Australian Journal of Administrative Law 89, 95-6. The main theme of the Sidebotham article is a criticism of the requirement for jurisdictional error. That theme is not affected by this criticism of the analysis.

15 [1947] 1 KB 223.

16 Ibid 229.
cases such as Kruse v Johnson. Although in England the cases on unreasonableness of delegated legislation have been treated as a separate ground of common law review, in Australia it has been accepted that Wednesbury unreasonableness is a test of ultra vires. It is presumed that it is a condition of the grant of delegated legislative power that the power must be exercised in a manner that is not Wednesbury unreasonable. The Australian approach is consistent with the ultra vires theory although the practical reality is that 'review for so-called Wednesbury unreasonableness ... challenges the dividing line between merit and legality'. But, the Australian approach is unable to explain why it is only Wednesbury unreasonableness, rather than simply unreasonableness, that is implied. Given that Parliament is unlikely to have said anything expressly about the issue at all, why have the courts proceeded on the basis that Parliament intended one thing and not the other? Should the statutory implication be Wednesbury unreasonableness, or rationality or both? What are the limits on any such implications and why do they exist? The ultra vires theory has nothing to say about these questions. Clearly there are other principles being applied by the courts in making relevant choices.

The same analysis can be applied in relation to the rules of procedural fairness. Applying the ultra vires theory, the relevant legislation conferring the relevant power is interpreted as being subject to an implied condition that where the relevant power will interfere with a legitimate expectation the power can only be exercised after the person given the power has afforded 'procedural fairness' to those having a legitimate expectation. But again, why have the courts proceeded on the basis that the parliament intended one thing and not another? Why choose legitimate expectations rather than full blown rights or rather than mere expectations? And, if procedural fairness is statutory, why is it only procedural and not substantive fairness?

Even if administrative law is to be explained in terms of a theory of ultra vires it seems clear that more is involved than merely that theory. Some further theory is needed to explain the actual choices being made.

17 [1998] 2 QB 91. In Wednesbury Lord Greene referred to only one previous authority when setting out his test of Wednesbury unreasonableness. The previous case referred to was Short v Poole Corporation [1926] Ch 66. However, that was a case concerning alleged improper motives or taking into account irrelevant considerations. The only reference in that case to unreasonableness is by Pollack MR at 87-8. Pollock MR cites Kruse v Johnson.


19 Williams v Melbourne Corporation (1933) 49 CLR 142, 155; Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24, 41; Re Refugees Review Tribunal; Ex parte Aala (2000) 204 CLR 82, 100–101 [40]; Dennis Pearce and Stephen Argument, Delegated Legislation in Australia (2nd ed, 1999) 229-34.


22 See, eg, the description of the theoretical basis in Kioa v West (1985) 159 CLR 550, 609.
But the ultra vires theory, at least if it is limited to ultra vires of a statute, can be challenged on a more fundamental basis. There are at least three aspects of administrative law—one ancient and the other two relatively recent—that cannot be explained by that theory.

The ancient aspect of administrative law that cannot be explained by ultra vires theory is the availability of certiorari to correct an error of law on the face of the record of an inferior court or of an administrative tribunal. Such an error need not be a jurisdictional error and the availability of certiorari in this circumstance would not appear to be explainable in terms of ultra vires theory.

There are two more recent exceptions. The first is that, starting in 1967 in England, the rules of natural justice have been applied to the exercise of prerogative powers. This development was confirmed by the House of Lords in Council of Civil Service Unions v Minister for the Civil Service and is clearly now the accepted law in England. In England, the question whether a person exercising a power is required to comply with natural justice does not depend upon the source of the power but upon the nature of that power.

This same development has subsequently been recognised and followed in Australia.

Of course, once judicial review is not founded upon statutory interpretation or upon some traditional limitation upon prerogative powers then it can only be founded upon some autonomous development of the common law.

The second problem arises in relation to the expansion of judicial review to private sector bodies. There are at least two circumstances where judicial review has been extended to such bodies. The first is where the body is authorised by some private arrangement (such as a contract) to undertake 'public powers' or affect 'public rights' such as the right to work. The second is where private persons exercise such rights of

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24 For this purpose an error of law may include errors in findings of 'primary' facts; see Waterford v Commonwealth (1987) 163 CLR 54, 77; Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321, 340-41.


28 Examples include those bodies that have the right to determine whether a person can work in a particular trade or profession, such as sports associations, trade unions and professional associations. See eg Nagle v Felden [1966] 2 QB 633; Forbes v NSW Trotting Club (1979) 143 CLR 242; Mitchell v Royal N SW Canine Council Ltd (2001) 52 NSWLR 242, 246-7; AFL v Carlton Football Club [1998] 2 VR 546, 552; Martin Kosla, 'Disciplined for "Bringing Sport into Disrepute"—A Framework for Judicial Review' (2000) 25 Melbourne University...
their own volition, but in circumstances where the decision of that body has practical consequences. Examples include bodies established to administer self-regulatory schemes. They are not related to any statutory function. Where any explanation has been attempted then the explanation, as with the prerogative, is based upon the power of the judges to intervene.

These various exceptions to the ultra vires theory led some to doubt whether administrative law could be explained simply in terms of statutory interpretation and ultra vires. In a seminal article, Dawn Oliver suggested that judicial review was to be explained not on the basis of statutory interpretation, but rather on the basis of a free-standing principle of the common law. The debate has been taken up in other jurisdictions, including Australia, though perhaps not with the same vigour that it has been pursued in England.

THE RESPONSE OF THE ENGLISH COURTS

In recent times English judges and academic commentators have identified at least two bases for judicial review.

The first involves describing the principle supporting judicial review of administrative action as being the 'rule of law'. In itself this is probably not very contentious. However, 'the rule of law' can bear any number of meanings. Sometimes the phrase is used as a factual summary of the basic principles of 'constitutionalism'; sometimes as an ideal or aspiration only partly embodied in actual constitutional practice. Where the phrase is used as an 'ideal' or aspiration it may include broad conceptions of justice including the protection of human rights, the fulfilment of legitimate expectations etc.

English commentators have used the phrase the 'rule of law' in a 'rights based' or aspirational sense rather than in a 'rule-based' sense. So, it has been argued, some rights are so essential to the maintenance of the constitutional structure that they must be complied with notwithstanding that those rights might not be described as 'laws'. Such rights would include the right to equality, the right to fairness, the achievement...
of legitimate expectations etc. This approach enjoys significant academic support. There have also been significant extra-judicial writings on the 'rule of law' in an aspirational sense (including human rights) as a fundamental constitutional norm in the UK.

Until very recently it was unclear whether any of this was having any effect upon the House of Lords. For example in December 1998, Lord Steyn described ultra vires as the 'central principle of administrative law' However, it would seem clear that both the Court of Appeal and the House of Lords have now adopted a broader approach based upon a broad view of the rule of law. For example, in R (M ahmod) v Secretary of State for the Home Department, Laws LJ identified two possible bases for judicial review.

Upon the question, "What is the correct standard of review in a case such as this?", there are at least in theory [two possible common law approaches]. The first is the conventional Wednesbury position. . On this model the court makes no judgment of its own as to the relative weight to be attached to this or that factor taken into account in the decision-making process; it is concerned only to see that everything relevant and nothing irrelevant has been considered, and that a rational mind has been brought to bear by the Secretary of State in reaching the decision. The second approach recognises that a fundamental right, here family life, is engaged in the case; and in consequence the court will insist that that fact be respected by the decision-maker, who is accordingly required to demonstrate either that his proposed action does not in truth interfere with the right, or if it does, that there exist considerations which may reasonably be accepted as amounting to a substantial objective justification for the interference.

In that case Laws LJ adopted the second approach. This approach was expressly supported by three Law Lords, including Lord Steyn, in R v Secretary of State for the Home Department; Ex parte Pierson [1998] AC 539, 590–91; Thomas v Baptiste [2000] 2 AC 1, 22; R v Secretary of State for the Foreign & Commonwealth Office; Ex parte Bancoult [2001] QB 1067, 1095 [36], 1100–101 [45]–[47], 1103–4 [55]–[57] (holding that a 'peace, order and good government' power is subject to Wednesbury unreasonableness. Thoburn v Sunderland City Council [2001] EWCH Admin 934 [62]–[63] (holding that 'constitutional' statutes cannot be impliedly repealed). It is clear from these cases, particularly Bancoult and Thoburn that this approach involves a significant change to the UK Constitution, as it was previously understood. This change has not been adopted in Australia: contrast Bancoult with Durham Holdings v NSW (2001) 177 ALR 436.
Home Department; Ex parte Daly. In consequence of this new broad approach the House of Lords has now acknowledged that the principle of proportionality is recognised and applied by the English common law.

As John McMillan has commented,

[t]he English jurisprudence is leading increasingly to the position that there are rights ... that inhere in the constitutional structure. It is therefore said to be part of the judicial role to identify, articulate and safeguard those values as constitutional or legal rules. Notions of "fairness", "proportionality" and "equality" quickly emerge as legally enforceable conditions on the exercise of executive power.

This approach is based upon a broad view of the rule of law and, to that extent, may still be explained by a broad theory of ultra vires. The approach is, however, necessarily inconsistent with any attempt to give any role to legislative intent in relation to the relevant function. It is also inconsistent with separation of powers principles. The new English approach clearly permits merit review subject only to whatever forbearance the judge, as a matter of policy, is prepared to give. But in almost all cases the Parliament has given the task of merit determination to the executive, not to the courts. For the courts to take on that function themselves necessarily involves both ignoring the parliamentary intent and the performance by the judiciary of an executive function.

The New Zealand courts have adopted a similar approach to that of the English courts.

The other approach that has had some judicial support in England has not relied upon the rule of law as the basis for judicial review. Instead it has identified a new common law norm that limits the exercise of public power. Whereas the previous theory of judicial review was based upon the source of the power (in particular, a statutory source), now it is argued the theory is based upon the nature of the power (in particular whether it is a power that is appropriate for judicial review?). The justification for the change is that in consequence of it the courts can hold the executive (and, in principle at least, the legislature) accountable to the people by requiring them to act in accordance with certain minimum standards. So considered, the courts in

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41 [2001] 3 All ER 433, 446–7, 448.
42 The proportionality principle had previously been rejected by the House of Lords in R v Secretary of State for the Home Department; Ex parte Brind [1991] 1 AC 696.
43 R v Secretary of State for the Home Department; Ex parte Daly [2001] 3 All ER 433, 439–40, 445–7, 447, 448.
46 See, eg, Murray Hunt, 'Constitutionalism and Contractualisation of Government in the United Kingdom' in Taggart, above n 32, 27–33.
47 See Bayne, above n 29, 784; Len King, 'The Separation of Powers' in Courts in a Representative Democracy, Australian Institute of Judicial Administration (1995) 1, 10; Sir Gerard Brennan, 'The Purpose and Scope of Judicial Review' in Michael Taggart (ed),
Australia are concerned with the appropriateness of the exercise of power, not with the rule of law, at least as usually understood. This approach concentrates upon 'fairness' and upon 'outcomes'. International human rights norms, including the rights conferred by the European Human Rights Convention have played a significant role in the development of this approach.

Probably the best example thus far of the application of this approach is the case of R v North and East Devon Health Authority; Ex parte Coughlan. On the ultra vires approach the consequence of a failure to comply with a precondition to the exercise of a power was that the exercise of the power was invalid and of no effect. So, for example, where there was a requirement for a fair hearing, which had not been complied with, the courts would set aside the relevant administrative or judicial act. What the courts did not do was enforce the 'legitimate expectation'. To do that would be to turn the expectation into a substantive private right, rather than to require the decision maker to comply with the law.

Nevertheless, in R v North and East Devon Health Authority; Ex parte Coughlan the English Court of Appeal held that legitimate expectations can be enforced as substantive rights. In that case the relevant decision maker had promised a disabled person that health premises to which she was being shifted would be her 'home for life'. It was later decided to close those premises. No doubt the disabled person should have been afforded a fair hearing before that decision was taken. However, the Court of Appeal, led by the then Master of the Rolls, Lord Woolf, went further. It held that a legitimate expectation could be the source of substantive rights. It did so not on the

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49 See Minister for Immigration & Ethnic Affairs v Teh (1995) 183 CLR 273, 291; Victoria v Master Builders Association [1995] 2 VR 121, 166; Fisher v Minister of Public Safety & Immigration (No 2) [2000] 1 AC 434, 446–7; Paul Finn, 'Controlling the Exercise of Power' (1996) 7 Public Law Review 86, 93. As it was put by the Privy Council in Thomas v Baptiste [2000] 2 AC 1, 25, 'a decision-maker is free to act inconsistently with the expectation in any particular case provided that he acts fairly towards those likely to be affected'.

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basis of a breach of the rule of law, but on the basis that the failure of the decision maker to accord with the expectation would involve an 'abuse of power'. It would appear from Lord Woolf's reasons that the overarching principle that he views as supporting administrative law is preventing 'abuses of power'. This approach cannot be explained by any theory based upon ultra vires.

It may be that some of the recent changes in and development of the common law in England may in the future be ascribed instead to the Human Rights Act, 1998 (UK) which may well provide a statutory basis for the further development of judicial review in the United Kingdom.

Leaving aside the effect of that Act, these developments in England in identifying the common law principle behind administrative law have been described generally as 'the common law theory'. This description is unfortunate for at least two reasons. First, it suggests a degree of uniformity between those supporting a broader approach to judicial review than probably exists in fact. For example, in a recent article Paul Craig and Nicholas Bamforth have argued that the common law theory does not involve any change in the respective role and function of the courts and the Parliament. They suggest that under the common law theory the Parliament remains sovereign, but must spell out its intentions with considerable clarity if it is intending to interfere with the 'rule of law'. With respect, not all who would subscribe to the common law theory would accept that the courts would always defer to the Parliament in all circumstances. On the other hand, not all who subscribe to the 'common law theory' would agree that the courts have the power to question the validity of a statute. The reality is that 'bottom uppers' form a reasonably disparate and motley crew.

The other problem with describing the theory as 'the common law theory' is that it suggests that the ultra vires theory is somehow divorced from the common law. This is perhaps the worst fault of the description, and one to which it will be necessary to return in due course.

THE RESPONSE OF THE HIGH COURT

The High Court of Australia has also grappled with these issues. The history of its involvement has been discussed in a recent article by Susan Kneebone. For present purposes that history can be described reasonably briefly.

In *Kioa v West*, Mason J described natural justice as a 'common law doctrine' that was imposed by the common law upon decision makers. In the same case, Brennan J

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52 For example, in *R v Secretary of State for the Home Department; Ex parte Daly* [2001] 3 All ER 433 the acceptance of the principle of proportionality in administrative law would seem to be based upon both the common law and the Human Rights Act 1998 (UK). See Paul Craig, 'The Courts, Human Rights Act and Judicial Review' (2001) 117 Law Quarterly Review 589, 594.
55 Kneebone, above n 3, 103-12; see also Gageler, above n 1.
described the requirement to comply with natural justice as an expression of 'the legislature's intention that observance of the principles of natural justice is a condition of the valid exercise of the power'. That debate was continued in later cases. For example, in Attorney-General (NSW) v Quin Brennan J noted that the expansion of judicial review had been achieved by 'an increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power'.

In Quin Brennan J concluded:

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

This statement of principle would seem to confirm that the role of the courts in judicial review is based upon the principles of ultra vires and, further, that that principle precludes merit review. That statement of principle would seem to have majority support by the High Court. It would also seem that a majority of the Court would accept that, at least for statutory powers, the jurisdiction of the court to review administrative action is to be found in the relevant statute.

However, this debate does not have the same significance in the High Court as it has in England. In Australia it does not matter so much whether the basis of judicial review is viewed as being a common law concept that is subject to statute, or as being a necessary consequence of statutory interpretation. This is because, at least until very recently, Mason J would not have disagreed with the conclusion by Brennan J in Quin. Mason J's approach to judicial review may have been more flexible than Brennan J's, but it was clearly not intended to permit merit review. The reality is that Mason J's
approach, at least until very recent times, was still based upon legality and ultra vires. The difference is that Mason J found the source of ultra vires in the common law, as affected by statute; whereas Brennan J found it in statute affected by the common law.

This is to be contrasted with the approach in England. The common law theory, as it has developed there, is not concerned with legality or ultra vires at all. Rather, as explained above, it is concerned with the development and enforcement of new common law constitutional norms.

This brings us back to the problem referred to earlier of using labels in a way that is misleading. If the approach of Brennan J in *Quin* is described as the 'ultra vires theory' and that of Mason J in *Kiao v West* as the 'common law theory' this is misleading in that it suggests that the approach of Mason J was not itself based upon a theory of ultra vires, albeit a different one from Brennan J. Even more concerning is that the use of these labels may confuse Mason J's approach in *Kiao v West* with that of the English judges and commentators who have proceeded in a very different direction.

It is interesting to note that the Canadian courts have also generally adopted the view that judicial review is to be explained on the basis of ultra vires of a statute. However, the Canadian courts have reached a very different view as to how the relevant statute is to be interpreted. In Canada, the courts have accepted that administrative tribunals are to be afforded a degree of 'deference' that has been rejected by the Australian High Court. Even so, the basis for identifying just how much deference is due is to be discovered from the interpretation of the relevant statute. As it was put by Iacobucci J for the Court in *Pezim v British Columbia (Superintendent of Brokers)*:

From the outset, it is important to set forth certain principles of judicial review. There exist various standards of review with respect to the myriad of administrative agencies that exist in our country. The central question in ascertaining the standard of review is to

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67 The more recent approach of Sir Anthony Mason may have been affected by the English approach. In *Li Shuk Fai v Director of Immigration* [2002] HKCAFA 2 [87]-[99] Mason joined with the other members of the Hong Kong Final Court of Appeal in following the decision of the UK Court of Appeal in *R v North & East Devon Health Authority; Ex parte Coughlin* [2001] QB 213. Of course, that decision was given in a very different constitutional framework and could not be taken as suggesting that Mason would agree that that approach would be available in Australia. Nevertheless, the approach in that case does seem different to that previously taken by Mason.

68 Justice John Toohey in an article 'A Government of Laws and Not of Men?' (1993) 4 Public Law Review 158, 158-60 did discuss the 'rule of law' in terms similar to that of English commentators and judges, eg, that the rule of law as insisting on 'adherence to fundamental principles, especially the recognition of human rights'. In that article he concluded that the courts can invalidate statutes for breach of such fundamental principles. His Honour's judgments did not reflect this approach. Other Australian commentators have taken a similar approach, see, eg, Linda J Kirk, 'Chapter III and Legislative Interference with the Judicial Process: Abebe v Commonwealth and Nicholas v The Queen' in Adrienne Stone and George Williams (eds), The High Court at the Crossroads: Essays in Constitutional Law (2000) 119, 120-26.


determine the legislative intent in conferring jurisdiction on the administrative tribunal. In answering this question, the courts have looked at various factors. Included in the analysis is an examination of the tribunal's role or function. Also crucial is whether or not the agency's decisions are protected by a privative clause. Finally, of fundamental importance, is whether or not the question goes to the jurisdiction of the tribunal involved.

The description of the source of the jurisdiction to review the relevant act or decision is the same as that given by Brennan J. It is the statute. The Canadian Supreme Court, like the Australian High Court has accepted that its role in reviewing administrative action is based upon the principle of ultra vires. However, the content of the authority granted by the Canadian legislatures has been very differently interpreted by the Canadian courts.

THE CONSTITUTIONAL CONTEXT

As discussed above the English and New Zealand courts have, at least in recent times, accepted a wider basis for judicial review than ultra vires as it is generally understood. This basis is essentially that the common law itself will justify and authorise the courts in developing their own rules to control administrative action which breaches certain minimum standards identified by the common law. The courts in Australia and Canada have not gone so far. They have still identified the basis for judicial review as being the principle of ultra vires, that is, that the relevant administrative act or decision was in breach of or unauthorised by the law, or was beyond the scope of the power given to the decision maker by the law and was consequently of no legal effect, or the relevant decision maker had failed to comply with the law and should be compelled to do so.

The question then arising is whether Australian courts can or should follow the English lead? The answer is that they cannot. The reason lies in the constitutional context in which judicial review occurs in Australia.

With any liberal democratic government the constitutional structure must contain and support both the rule of law and the democratic principle. Usually they are not in conflict. The rule of law sustains the democratic institutions and vice versa. However, that is not always the case. Judicial review is one option for resolving conflict when the democratic will, or those representing it, breach the rule of law.

So understood, the debate about the nature and extent of judicial review is ultimately a constitutional debate. With an unwritten Constitution, such as in the United Kingdom and New Zealand, that constitutional debate has involved a consideration of constitutional principle against the background of the common law. (Somewhat surprisingly, in both countries the debate has largely ignored the views of

71 (1994) 2 SCR 557, 589-590 ; 114 DLR (4th) 385, 404; see also Deputy Minister of National Review v Mattel Canada Inc (2001) 2 SCR 100, 113-115; 199 DLR (4th) 598, 608-9; Moreau Berube v New Brunswick (Judicial Council) [2002] SCC 11 [36]-[67].
72 Judicial review by the ordinary courts is not the only mode of review within a constitutional context; see, eg, the specialised German courts discussed in Cheryl Saunders, 'Administrative Law and Relations Between Governments: Australia and Europe Compared' (2000) 28 Federal Law Review 263, 280-3, 285-6.
the voters. However, with a written Constitution the debate must begin with the document.

Both the rule of law and the democratic principle are assumptions upon which the Commonwealth Constitution is drafted. The assumptions form at least part of the context for the interpretation of the Constitution.

It is clear that the 'rule of law' is a fundamental assumption of the Commonwealth Constitution. The concept of a Constitution as a fundamental source of governmental authority may itself assume the rule of law. In any event, covering clause 5 requires governments and subjects to obey the Constitution and laws made under it and specific provisions, particularly ss 75(iii) and (v), can be viewed as manifestations of the principle. Other provisions within Chapter III of the Constitution have also been viewed as being reflective of 'the rule of law', for example, section 80. The principle of separation of judicial power from legislative and executive power, which is contained within the text and structure of the Constitution, is also reflective of the principle. So too is the separate but related 'incompatibility principle' recognised in Kable v Director of Public Prosecutions that the Parliaments cannot confer an 'incompatible function' upon a State or federal court or upon a judge of such a court.

74 However, Lord Lester is probably correct when he says that the changes have occurred 'without great public controversy': Lord Lester, 'Developing Constitutional Principles of Public Law' (2001) Public Law 684, 685.


79 Re Carmody; Ex parte Glennan (2000) 173 ALR 145, 147; Re Patterson; Ex parte Taylor (2001) 182 ALR 657, 673 [64]; Re McBain; Ex parte Australian Catholic Bishops Conference (2002) 188 ALR 1, 67 [263].


82 Kable v Director of Public Prosecutions (1996) 189 CLR 51 (‘Kable’). The ‘incompatibility principle’ had previously been justified in relation to federal courts on the basis that such a principle was necessary in order to prevent the separation of powers doctrine from being undermined: Hilton v Wells (1985) 157 CLR 57, 67, 73–4, 81–2; Grollo v Palmer (1995) 184 CLR 348, 362, 364–5, 376, 390, 398. However, since the decision in Kable extended the principle to state parliaments and state courts it is clear that the incompatibility principle can no longer be justified on the basis of separation of powers principles. Rather, the incompatibility principle is now justified on the basis that the text and structure of the Constitution require an ‘integrated court system’ dealing with an ‘integrated system of law’. The incompatibility principle as it applies both to federal and state courts is no longer an aspect of the principle of separation of powers contained within Chapter III, even though it is related to it: Kable (1996) 189 CLR 51, 95, 103–4, 117.

83 Kable (1996) 189 CLR 51, 95–6, 101–4, 110–16, 139–44. For example, the requirement of impartiality, which is recognised in the incompatibility principle, reflects the rule of law: Ex parte Miah (2001) 179 ALR 238, 282 n 133; Ebner v Official Trustee in Bankruptcy (2000) 176 ALR 644, 667 [103].
It is one thing for 'the rule of law' to be assumed by the Constitution. It is another to describe its meaning and effect. The 'rule of law' as assumed within the Commonwealth Constitution involves a relatively narrow use of the phrase. The practical operation and effect of 'the rule of law' assumption is that the executive and the people are subject to the law as interpreted and declared by the courts, that federal judicial power should be separate and distinct from legislative and executive power and that judges should be impartial and independent.

The 'rule of law' as assumed within the Commonwealth Constitution has two particular elements that are critical to the analysis of the proper role of judicial review. Those elements are primarily derived from the High Court's analysis of the separation of powers principle within the Commonwealth Constitution. The first element is that it is the role of the courts to interpret and apply the law. The second is that the separation of judicial power from legislative and executive power operates to limit the power of the judiciary in relation to the functions to be performed by both the executive and the legislature.

The 'democratic principle' is reflected within the Commonwealth Constitution by the express terms of Chapter I of the Constitution and in the implication of that form of representative democracy that can be identified particularly from ss 7 and 24. As Keith Mason has suggested:

By affirming the supremacy of Parliament the (rule of) law thereby concedes the hierarchy of enacted over common law. In doing so (indirectly) affirms democratic values, to the extent that parliament functions and continues to function in a democratic milieu.

The democratic principle, in affirming the primacy, subject only to the Constitution, of the democratic institutions of governments, also necessarily requires a limited role for judicial review.

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84 It would appear that the Canadian Supreme Court also takes a relatively narrow view of the rule of law in a constitutional context: Reference re Secession of Quebec [1998] 2 SCR 217, 247-250, 257-261; 161 DLR (4th) 385, 409-11 [49]-[54], 417–20[70]–[78].
86 This analysis is fundamentally the same as that of Kneebone, above n 3, 99 and of Gageler, above n 1, 309–10. It differs from Susan Kneebone's analysis in that it views the Constitution (rather than a different common law analysis) as being the distinguishing feature between the English and the Australian approach. It differs from Stephen Gageler's in that it does not concentrate on s 75(v) as being the only relevant constitutional provision, and identifies the role of the Constitution in the development of the common law.
EFFECT OF THE CONSTITUTION

Notwithstanding the different labels that have been used, sometimes in a misleading fashion, it is clear that the questions of the proper basis for and the extent of judicial review are ultimately questions to be answered by the common law. This is true whether the basis for judicial review is to be found in the common law rules and presumptions relating to the interpretation of statutes or in a separate common law norm. However, it needs to be understood that in this area of discourse the common law has a symbiotic relationship with the constitutional structure. It both informs our understanding of the Constitution, but itself must conform to that Constitution.

As Kirby J remarked in Pfeiffer v Stevens, '[i]n Australia, the legitimacy and authority of all law must ultimately be traced to, or be consistent with, the federal Constitution.' So, within Australia, the common law must conform to the Constitution. Where there is repugnancy between the common law and the Constitution then, as would be the case with a repugnancy to a statute, the common law is abrogated so as to avoid the repugnancy. However, the Constitution has a broader effect upon the common law than merely to abrogate it in cases of inconsistency. In addition the common law can and should be developed by the courts by reference to constitutional principles even where there is no repugnancy.

These effects can be seen in the role of judicial review in Australia. It will be recalled that one of the elements of the rule of law within the Commonwealth Constitution is that it is the role of the courts to finally determine what the law is. This element is strictly limited to the federal courts. A common law principle that was repugnant to that element would be abrogated to that extent. However, there is a single common law in Australia. It can be expected that the single common law will develop in a uniform and consistent fashion having regard to that constitutional element. This explains why judicial deference to the legal interpretation of administrative decision makers was necessarily rejected by the High Court in

91 See D C Pearce and R S Geddes, Statutory Interpretation in Australia (4th ed, 1996) 22–26. For the purposes of this article it is unnecessary to consider what is the 'correct' common law approach to statutory interpretation: see discussion in Antonin Scalia, A Matter of Interpretation (1997).
Corporation of the City of Enfield v Development Assessment Commission notwithstanding that that decision was in State, not federal, jurisdiction. The constitutional principle applicable to federal courts was ‘picked up’ by the common law and applied, as a common law principle, to federal and State courts.

On the other hand, in Canada, where separation of judicial power is not so rigid (or at least, not yet so rigid) as in Australia and where administrators may exercise judicial power in some circumstances, such extended deference may remain possible. In the United States such deference may be based upon the three way separation of powers which must accommodate a role for the executive branch in at least interpreting the law.

Another element of the rule of law under the Commonwealth Constitution restricts federal courts from performing executive functions. Applying the same reasoning it can be expected that this element would be applied in the development of the uniform and single Australian common law. This element explains why the Australian courts cannot adopt a free standing ‘common law theory’ of the English or New Zealand type to explain judicial review. The Constitution itself limits the role and function of the federal courts. It is not their role or function to carry out the executive function of administration or the legislative function of determining policy. These are the

96 Mason, above n 65, 399–41.
97 The extent of deference in Canada is discussed above. The Canadian Constitution does not contain a strict separation of judicial power. Rather there is a narrower principle prohibiting the conferral of jurisdiction contrary to s 96 of the Canadian Constitution: see McMillan Bloedel v Simpson [1995] 4 SCR 725, 737-43; 130 DLR (4th) 368, 390-4. This principle does not necessarily prevent judicial functions being conferred on administrators, particularly if such functions can be viewed as ancillary to administrative functions; see generally Peter Hogg Constitutional Law of Canada (4th ed, 1997) 197–205. The principle of judicial independence recently identified in the Canadian Constitution in Reference Re Public Sector Pay Reduction Act (PEI) [1997] 3 SCR 3; 150 DLR (4th) 577 would seem to be similar to the ‘incompatibility principle’ as applied by the Australian High Court, rather than a strict separation of judicial power.


99 The effect of the Constitution in relation to state courts is more limited than in relation to federal courts: see Kable v Direction of Public Prosecutions (1996) 189 CLR 51. However, the effect upon the common law is the same. This is for two reasons. First, there is a single common law and not (as in the US) separate federal and State common laws. Second, the effect of the constitutional principle is not direct; it merely provides a direction for the development of the common law. The development need not be limited to the constitutional principle so long as it is not repugnant to it.

100 In this context statutory ‘appeals’ de novo from administrative decisions must be distinguished from judicial review on the basis of merit. Even though there may be little or no difference in substance, the former will usually involve the exercise of judicial power; the latter would involve the exercise of executive power: see Precision Data Holdings v Wills (1991) 173 CLR 167, 189; R v Davison (1954) 90 CLR 353, 369–70; Pasini v United Mexican
The proper role of the other arms of government. The proper role of the federal courts is to determine if the relevant legislative or executive act or decision was in breach of or unauthorised by the law or was beyond the scope of the power given to the decision maker by the law. In this broad sense, the proper role of the federal courts is to determine if the act or decision was ultra vires and was consequently of no legal effect, or if the relevant decision maker had failed to comply with the law and should be compelled to do so. Applied more generally to the development of the common law, all Australian courts are predulled by the common law from merit review simply because the relevant legislative scheme has clearly conferred the determination of merit to a legislative or executive body.

This second element also explains why Australian courts must retain a distinction between jurisdictional errors and non-jurisdictional errors. Notwithstanding the difficulty, indeed often apparent artificiality, of the distinction, it is a distinction between errors that are authorised and errors that are not; between acts that are unauthorised by law and acts that are authorised. Such a distinction is inherent in any analysis based upon separation of powers principles.

This limited role of judicial review is confirmed by the 'the democratic assumption' which affirms the primacy of valid statutes over the common law.

When the role of the Commonwealth Constitution in identifying and limiting the role of the courts in judicial review is understood it is not surprising that countries with a written Constitution, such as Australia and Canada, have taken a more limited view...
of the proper role of judicial review than have countries with an uncontrolled Constitution, such as the United Kingdom and New Zealand. As Kirby J noted in Durham Holdings v NSW, 'in Australia the common law operates within an orbit of written constitutional laws and political realities'. The vigorous debate that has occurred in England over the last decade as to the proper role and function of judicial review has taken place in a different constitutional context to that in Australia—the consequence is that much if not all of that debate is fundamentally irrelevant to Australian judges and lawyers.

Other questions remain where the constitutional context may have some role. For example the extent to which the Parliament may legislate to limit what errors may be described as jurisdictional errors without transgressing the Constitution may still be a live constitutional issue. There is also some suggestion in some cases that s 75(v) of the Commonwealth Constitution is itself the source of some of the obligations and duties at least upon Commonwealth officers although it seems clear that even if those rights and obligations are somehow 'constitutionalised' by s 75(v) they are still to be identified from the common law as understood in the context of the Constitution.

On the other hand, the role of the Commonwealth Constitution should not be overstated. It provides the ultimate justification for judicial review and sets its parameters, but does not explain the detail of its operation. True it is that the constitutional context means that parliamentary intent as expressed in a statute has primacy over the common law; true it is that the constitutional context means that the courts cannot engage in merit review and are required to differentiate between 'jurisdictional errors' and 'non jurisdictional errors'. But within these parameters there is still considerable room for debate for example as to whether a particular error should be considered a jurisdictional error or not.

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106 Philip Joseph has commented (with considerable justification) 'if for lawyers from outside the United Kingdom, the debate may seem excessively introspective and distracting' in Joseph, above n 45, 356.


108 See Construction Forestry, Mining and Energy Union v Australian Industrial Relations Commission (2001) 203 CLR 645, 660 [43] (the Court); Re Refugee Tribunal; Ex parte Aala (2000) 204 CLR 82, 133–6 (Kirby J); Re Minister for Immigration and Multicultural Affairs; Ex parte Miah (2001) 179 ALR 238, 290–92 (Kirby J); see also Gairy v Attorney-General (Grenada) [2002] 1 AC 167, 178–81.

109 See Minister for Immigration & Multicultural Affairs v Bhadwaj (2002) 187 ALR 117, 128 [47] (Gaudron and Gummow JJ); Re Refugee Tribunal; Ex parte Aala (2000) 204 CLR 82, 91–101 (Gaudron and Gummow JJ), 128 (McHugh J), 135 (Kirby J), 141–3 (Hayne J); Re Minister for Immigration and Multicultural Affairs; Ex parte Miah (2001) 179 ALR 238, 245–6 (Gleeson CJ and Hayne J), 258 (Gaudron J), 266–7 (McHugh J).

Accepting that the Commonwealth Constitution does impose parameters upon the extent of judicial review the question arises whether the three exceptions to the ultra vires theory that were identified above are consistent with those parameters. It will be recalled that the three exceptions were the availability of certiorari for error on the face of the record, the extension of judicial review to the prerogative and the extension of judicial review to private sector bodies.

The availability of certiorari for error on the face of the record can be explained in terms of the history of the writ and its use to facilitate what was, in effect, an appeal from inferior courts. This anomaly may explain why s 75(v) of the Constitution expressly refers to prohibition and mandamus (both of which do require a jurisdictional error), but not certiorari. It may also explain the approach of the High Court in Re McBain; Ex parte Australian Catholic Bishops Conference where, by majority, the Court held that certiorari was not available to correct a non jurisdictional error unless there was a 'matter' in which the parties (including the Attorney-General) had a real interest. Notwithstanding these possible explanations and limitations, the availability of certiorari to correct an error on the face of the record remains an exception to the ultra vires theory. It is difficult to justify or explain that exception in terms of the constitutional parameters discussed above.

The more recent exceptions may be capable of some explanation consistent with constitutional principle. For example, the question whether judicial review can or should extend to prerogative powers or not, and, if so, how, may not even arise in Australia. It is at least arguable that all governmental power, including the prerogative, is either derived from the Commonwealth Constitution or from statute. For example, Commonwealth executive power is derived from s 61 of the Constitution or from statute; State executive power is derived from s 7(2) of the Australia Act 1986 (Cth) or from statute. Even if the ultra vires theory is explained in terms of parliamentary sovereignty and statutory interpretation there is no reason why those powers should not be subject to judicial review, save for policy issues that may need to be considered in relation to particular powers. Even if this explanation was not accepted, the common law could develop so as to limit the prerogative (or aspects of it) by the principles of administrative law. To this extent at least the debate between Mason J and Brennan J whether the source of ultra vires is to be found in the common law or in the statute remains open.

Similarly the apparent application of judicial review to non-governmental parties may be able to be explained by private rather than public law principles. For example, judicial review might be explained in a particular case by implying the requirements of

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111 Re McBain; Ex parte Australian Catholic Bishops Conference (2002) 188 ALR 1, 23 [86], 27-28 [98]-[100], 65-66 [255]-[260].
112 Ibid at 70 [276].
113 Ibid at 43 [165]. However the Convention Debates suggests that there was no clear reason why certiorari was not included: see Official Record of the Debates of the Australian Federal Convention, Melbourne, 31 January 1898, 320-1, 1875-85.
114 (2002) 188 ALR 1, 8 [20], 17 [62], 21 [76], 62 [245]-[246] contrast 54 [207]-[208].
natural justice into a contract or other arrangement or by the application of equitable principles to the particular case.

**CONCLUSION**

The question of the proper role and the limits of judicial review is self evidently a constitutional question. With a written Constitution the proper place to commence the consideration of that question is with the written document. When this is done with the Commonwealth Constitution the structure and provisions of the Constitution justify the role of the judiciary in determining the legality of legislative and administrative action but also limit the role of the judiciary in performing executive or legislative acts. These constitutional limitations set the parameters for the development of the common law principles of judicial review in Australia. They are reflected in a number of basic principles of the Australian common law such as the distinction between legality and merit review as reflected in the distinction between jurisdictional and other errors.

These constitutional parameters do not resolve all issues of principle that inform the development of the common law of judicial review, but they do have the effect of establishing a marked difference between the Australian common law of judicial review and recent developments in England and New Zealand. This has the happy consequence that the common law of judicial review in both England and New Zealand can increasingly be ignored in Australia.